AMERICAN ARBITRATION ASSOCIATION

| PAUL ARMBRUSTER, | | |
|--------------------|------------|---------------------|
| | Claimant, | |
| VS. | | No. 01-16-0003-4446 |
| T-MOBILE USA, INC. | | |
| | Respondent | |
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CLAIMANT'S OPPOSITION TO RESPONDENT'S MOTION FOR SUMMARY JUDGMENT AND MOTION FOR SUMMARY JUDGMENT

I. <u>INTRODUCTION</u>

No matter how T-Mobile attempt to muddy the issues, and no matter how T-Mobile might wish it were; this is <u>not</u> a "prior express consent" case. Whether T-Mobile is "exempt" from the need to get additional - or even any - consent from its customers before sending certain text messages is irrelevant.

It is irrelevant because: 1) T-Mobile obtains prior express consent through its Terms and Conditions; and, 2) petitioner does not claim any damages relating to the lack of prior express consent. This case is about whether a consumer can **revoke** prior express consent under the Telephone Consumer Protection Act (TCPA) ¹ and the statutory damages sought relate only to text messages sent **after** claimant validly revoked consent. T-Mobile has provided ample evidence to show certain common carrier calls may not be subject to "prior written consent" requirements, however, they provide not a shred of evidence to support their theory – that a consumer **cannot revoke** consent. They provide none because there is none to support such a position. The Federal Communications Commission (FCC) has issued numerous orders stating, unequivocally, that consumers can revoke consent; a plethora of case law indicates the same; and most damning, both T-Mobile and the Cellular Telecommunications Industry Association (CTIA), a membership group representing the wireless industry – of which T-Mobile is a member – have filed public comments before the FCC explicitly stating that wireless customers can revoke consent under the TCPA, and in fact, the TCPA requires common carriers to accept and respond to the revocation of consent by their customers (discussed below).

In the present matter, whether T-Mobile is exempt from having to obtain prior express consent to send text messages to its customer's amounts to a legal "so what". T-Mobile is aware of claimant's position yet they totally ignore the issue of revocation in their motion. Instead, counsel latch onto two Federal Communications Commission (FCC) soundbites (one from nearly 25 years ago), and in doing so misrepresents those statements by ignoring the "prior express consent" context in which they are made. T-Mobile is well aware of its obligations under the TCPA and have made public comments to the FCC on the topic of revocation, but now in a non-public arbitration they take a position contrary to what they

¹ The TCPA is codified at section 227 of the Communications Act of 1934, as amended. See 47 U.S.C. § 227.

² Respondent will likely now ask for an opportunity to file a reply. They should be denied that opportunity because; a. they were on notice as to the claim of revocation and failed to address the issue; b. there are no facts in dispute.

know the law requires of them. As respondent points out, there are no facts in dispute: 1) Claimant is a T-Mobile customer; 2) Claimant validly opted-out and revoked consent to receive future text messages from T-Mobile; 3) T-Mobile knowingly and intentionally continues – and refuses to stop – to send text messages to Claimant; 4) this violates the TCPA; 5) statutory damages of \$1500 should be awarded for each and every text sent after claimant revoked consent. Because the facts are undisputed and considering the law discussed below, summary judgment should be entered in favor of claimant.

II. Choice of Law

Petitioner is subject to the "T-Mobile Terms & Conditions" which provide:

This Agreement is governed by the Federal Arbitration Act, applicable federal law, and the laws of the state in which your billing address in our records is located, without regard to the conflicts of laws rules of that state. Foreign laws (except for Puerto Rico) do not apply. Arbitration or court proceedings must be in: (a) the county and state in which your billing address in our records is located, but not outside the U.S.; or (b) in Puerto Rico if your billing address is in Puerto Rico. If any provision of the Agreement is invalid under the law of a particular jurisdiction, that provision will not apply in that jurisdiction.

Petitioner is a resident of Arizona and has been a resident of Arizona at all times relevant to the present action. Petitioners billing address is in Arizona and therefore the laws of Arizona and the Federal Ninth Circuit govern the adjudication of this matter.

III. AN EXEMPTION FROM PRIOR EXPRESS CONSENT REQUIREMENTS IS NOT AN EXEMPTION FROM CONSUMER OPT-OUT OR REVOCATION OF CONSENT

Make no mistake, counsel are sophisticated lawyers, well versed in TCPA law, and absolutely aware of the absurdity of their position. T-Mobile inserts class action waiver and binding arbitration clauses into their terms and conditions and this allows them to assert positions under the veil of arbitration, away from the public eye, or any scrutiny from the FCC enforcement bureau. T-Mobile,

would never take the current position if it were in court or in front of the FCC. What is clear however, as soon as you scratch the surface of the "evidence" they offer up to support their position the "exemption" theory comes crashing down.

A. <u>FCC STATEMENTS RELIED ON BY RESPONDENT RELATE TO "PRIOR EXPRESS</u> CONSENT" NOT REVOCATION

Respondent points to two specific statements made by the FCC that supposedly support their position (Respondent's MSJ at p.4). The first was made in 1992 – some 24 years ago – and the second in 2012. Both of these statements discuss the same issue and use similar language. Respondent, however, chose to exclude from its motion two portions of those statements that provide context and clarity on what the FCC was ruling on. The complete quotation is as follows.

10. Calls Not Subject to Written Consent Requirement. While the Commission adopts rules to protect consumers from unwanted telemarketing robocalls, it leaves undisturbed the regulatory framework for certain categories of calls. Specifically, consistent with section 227(b)(2)(C) of the Act and its implementing rules and orders, the Commission does not require prior written consent for calls made to a wireless customer by his or her wireless carrier if the customer is not charged. One commenter requests that the Commission clarify that wireless carriers may send free autodialed or prerecorded calls, including text messages, without prior written consent, if the calls are intended to inform wireless customers about new products that may suit their needs more effectively, so long as the customer has not expressly opted out of receiving such communications. As noted above, the Commission addressed this issue in the 1992 TCPA Order, published at 57 FR 48333, October 23, 1992, by concluding that Congress did not intend to prohibit autodialed or prerecorded message calls by a

wireless carrier to its customer when the customer is not charged. The Commission based its conclusion on the fact that neither the TCPA nor its legislative history indicates that Congress intended to impede communications between common carriers and their customers regarding the delivery of customer services by barring calls to wireless consumers for which the consumer is not charged. Nothing in the record or the Commission's analysis of consumer complaints provides it a reason to alter its finding. Exhibit A at § 10 (Emphasis added)

First, respondent conveniently omits the heading that provides context, that is, the FCC is discussing an exclusion from the need for prior written consent – not an exclusion of a consumer's ability to revoke prior given consent; Second, and as respondent points out, the "FCC granted commenters the clarification they were seeking." (Respondent MSJ at p. 3), however, they omitted language from their citation that is absolutely fatal to their position, namely "so long as the customer has not expressly opted out of receiving such communications." Exhibit A at § 10 (Emphasis added)

B. THE 2012 ROBOCALL REPORT AND ORDER – COMMENTS BY T-MOBILE

In 2012 the FCC issued a report (Exhibit B) revising certain rules that protect consumers from unwanted calls ³ pursuant to the TCPA. The order is riddled with language like "And to ensure consumers can easily change his or her mind even when written consent has been given" (Exhibit B at p. 46 – Statement of Chairman Genachowski) and "by enacting the TCPA and its prohibitions on unwanted calls, Congress had already made an assessment that the benefits of protecting consumers privacy is

³ Calls and text messages are treated identically under the TCPA (Exhibit B at ¶ 4; fn. 12); Satterfield v. Simon & Schuster, 569 F.3d 946 (9th Cir. 2009)

substantial" (Exhibit B at ¶ 19). What is jaw-dropping, however, is paragraph 27 entitled "Calls Not Subject to Written Consent Requirement." Midway through paragraph 27 the Commission states;

"One commenter requests that the commission clarify that wireless carriers may send free autodialed or pre-recorded calls, including text messages, without prior written consent, if the calls are intended to inform wireless customers about new products that may suit their needs more effectively, so long as the customer has not expressly opted out of receiving such communications." (emphasis added)

The commenter referred to by the FCC is the respondent in this action, T-Mobile (Exhibit B at ¶ 27 and fn. 70). Yet, T-Mobile appear in this arbitration and asserts that a consumer cannot opt out of receiving text messages. Astounding, and this alone should put the issue to bed - but there is more.

C. THE 2012 DECLARATORY RULING RE: SOUNDBITE AND THE COMMENTS BY CTIA

Again in 2012 the FCC issued a Declaratory Ruling (Exhibit C) in response to a request by SoundBite Inc. seeking clarification that sending a one-time text message confirming a consumers optout request does not breach the TCPA. In short, the FCC agreed and granted the petition stating that sending a one-time message in response to an opt-out request does not breach the TCPA or FCC rules. A reading of SoundBite simply confirms the fact that consumers can revoke consent – even consent given to common carriers. What is astonishing in SoundBite, however, are the representations made by CTIA ⁴ to the FCC with respect to opt-out obligations under the TCPA and best practices and obligations of common carriers. (Exhibit D, pp.6-7 and paraphrased below)

⁴ T-Mobile is a member of CTIA - http://www.ctia.org/about/our-members and respondent cites comments by CTIA in its motion.

- After a subscriber provides express consent an opt-out request must be processed by the content provider
- The content provider must receive and process the opt-out
- Industry best practice require parties to send a confirmation message
- Under MMA ⁵ best practices, if a subscriber sends "Stop" the provider must respond with a terminating message
- Consumers have come to rely and expect the widespread, standard industry practice of replying "Stop"
- To comply with the TCPA the content provider is required to accept the opt-out
- Carriers and content providers have embraces the MMA best practices
 (Exhibit D, pp.6-7)

T-Mobile's position in the present action does not pass the red face test and the following representation by CTIA is worthy of a direct quote: Again, the wireless industry's position is absolutely fatal to the position T-Mobile now advances.

Moreover, the CTIA Compliance Monitoring and Enforcement Playbook, which is part of the wireless industry's self-regulatory efforts to audit SMS messages and ensure that they are consistent with best practices (including the MMA Best Practices), includes as compliance violations the "[f]ailure to respond to user message to STOP service" and the failure to confirm service and message flow terminations." In addition, in 2008 and 2009, the Florida Attorney General terminated investigations of mobile content practices after the execution of Assurances of Voluntary Compliance ("AVCs") with several carriers. These AVCs

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⁵ Mobile Marketing Association U.S. Consumer Best Practices §1.5-1

include provisions that parallel the MMA Guidelines with respect to critical disclosure and billing issues, incentivizing carriers further to comply with the broader set of requirements set forth in the MMA Guidelines – (which include sending one-time confirmatory opt-out text messages).

(emphasis added) (Exhibit D, at pp.6-7 fn. 19)

Also of importance in the CTIA comments is that, as far as opt-out are concerned, "there is no reason to draw a distinction for informational messages and prevent confirmations solely for those messages." In other words, opt-outs apply equally to marketing and informational messages (Exhibit D, at p. 7) T-Mobile is shameless. They appear in front of the FCC and make representations that indicate compliance with the TCPA in order to influence rule-making in a way that is beneficial to them, and then, 1) don't follow the rules they are legally obligated to follow, and, 2) appear in this arbitration arguing that those rules somehow now don't apply to them.

IV. THE 2015 FCC OMNIBUS DECLARATORY RULING AND ORDER

In June 2015 the FCC released the most comprehensive TCPA Ruling and Order in recent memory (Exhibit E). This order talks extensively about revocation of consent and if there was ever a place for the FCC to articulate T-Mobile's "carrier exception" to revocation of consent, this would be the document. They do not, not even a footnote that remotely indicates such an exception exists. What they do say, however, is entirely consistent with claimant's position. The FCC re-confirms that "Consumers may revoke consent at any time through and reasonable means" and that "a caller (T-Mobile) may not limit the manner in which revocation may occur." The FCC does not condition the right of revocation (Exhibit E, p. 5; ¶ 47). If a "carrier exemption" to revocation were to actually exist you would certainly find it articulated in this order. It is not. In fact, the FCC does not stop there, they devote nearly 5 pages

on the issue of revoking consent (Exhibit E, at pp. 33-38; ¶55-70) and they address and rebuke every single "opinion" of TCPA law expressed here by T-Mobile. Paragraph 55-70 of Exhibit E is the current state of the law of revocation under the TCPA. It leaves no doubt that a consumer can revoke consent to receive text messages and T-Mobile *cannot* infringe on that right.

A. THE TCPA IS SILENT ON REVOCATION – THE LAW IN THE NINTH CIRCUIT

The TCPA is silent on the issue of revocation. Where a statute is silent on an issue a federal agency is permitted to provide a construction of the terms of that statute.⁶ The United States Supreme Court has set a two-step test for judicial review of administrative agency interpretations of federal law:

1) is the intent of Congress clear; 2) if a statute is silent (as is the case here) or ambiguous with respect to the issue at hand the judiciary must defer to the agency so long as the agency's answer is based on a permissible construction of the statute. Chevron v. Natural Res. Def. Council, Inc., 467 U.S. at 842-43, 104 S.Ct. 2778.

Gager v. Dell Financial Services, LLC, 727 F.3d 265, (3rd Cir. 2103) has addressed this very issue and concluded that "in light of the TCPA's purpose, any silence in the statute as to the right of revocation should be construed in favor of consumers." *Gager* at 270. *The* FCC agrees with this interpretation (Exhibit E, ¶ 56) and does not condition opt-outs or revocation. While revocation has not been specifically addressed by the Ninth Circuit or District courts in Arizona, a majority of District Courts in California have spoken to this issue—including the Southern District of California in Hudson v. Sharp Healthcare, 2014 WL 2892290 (S.D. Cal. June 25, 2014) *and Van Patten v. Vertical Fitness Group, LLC*, 2014 WL 2116602 (S.D. Cal. May 20, 2014) — all agree that consumers are permitted to revoke their prior-given consent under the TCPA. The Ninth Circuit has addressed deference to FCC rules in a TCPA context. In Satterfield v. Simon & Schuster, 569 F.3d 946 (9th Cir. 2009) a term used in the TCPA (in this

⁶ See also, <u>Peck v. Cingular Wireless, LLC</u>, 535 F.3d 1053, 1056 (9th Cir.2008)

instance "Call") was not defined, the FCC had however issued opinions defining what constitutes a call. The Ninth Circuit deferred to the FCC's interpretation of what activities constitute making a call under the TCPA. Given the TCPA is a board consumer protection statute, and taking into account the common law right to revoke consent, the FCC interpretation recognizing a consumers absolute right to revoke consent is a reasonable interpretation on the TCPA and should certainly be followed in this matter.

Respondent's point to a cases seemingly supporting their position. These cases are all of the exact same genre. In O'Conner v. Diversified Consultants, ⁷ defendant was granted summary judgment based on O'Conner's position that he did provide prior express consent. The court ruled that the calls did not need "prior express consent." As discussed above, this is a legal "so what." Plaintiff did not argue, nor did the court decide that a consumer could not revoke consent under the TCPA. These are not revocation cases. See Dell ⁸ and Exhibit E for the current state of TCPA law as it relates to revocation of consent.

V. CONCLUSION

Respondents conflate an exemption from needing to obtain "prior express consent" to receive text messages with a consumer's ability to revoke consent under the TCPA. These are two distinct and separate issues. T-Mobile is well aware of its obligations with regard to revocation of consent – how do we know that? Because they put it in writing when making comments to the FCC. T-Mobile has a class action waiver and binding arbitration clauses in their terms and conditions, so they are immune from the big ticket litigation and court scrutiny of their infringing actions. Make no mistake, companies like T-Mobile have done the math and the benefits reaped by ignoring opt-out obligations far outweigh the exposure. They now attempt to skirt the reduced individual exposure in arbitration by knowingly

7 O'Conner v. Diversified Consultants, Inc., No. 4:11CV 1722 RWS, 2013 WL 2319342 (E.D. Mo. May 28, 2013

⁸ Gager v. Dell Financial Services, LLC, 727 F.3d 265, 270 (3rd Cir. 2103)

misrepresenting what they know their obligations are. The law is clear. Under the TCPA consumers can revoke consent to receive text messages. This right is not conditioned or "exceptioned." For these reasons, summary judgment for claimant is appropriate and T-Mobile should be ordered to pay statutory damages of \$1500 per violation and ordered to stop sending claimant text messages.

This 23rd day of November, 2016

/s/ Paul Armbruster

Paul Armbruster

15842 S. 13th Pl.

Phoenix, AZ, 85048

(480) 840-4278

CERTIFICATE OF SERVICE

| This is to certify that I have served a copy of CLAIMANT'S OPPOSITION TO |
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| RESPONDENT'S MOTION FOR SUMMARY JUDGMENT AND MOTION FOR SUMMARY |
| JUDGMENT upon Respondent, the AAA, and Ms. Speth per below: |

| Respondent: Lisa.Garcia@alston.com; Derin.Dickerson@alston.con | Respondent: | Lisa.Garcia@alston.com | ; Derin.Dickerson@alston.con |
|--|-------------|------------------------|------------------------------|
|--|-------------|------------------------|------------------------------|

Arbitrator: mcs@jaburgwilk.com

AAA: Upload to case documents

This 23rd day of November, 2016

/s/ Paul Armbruster____